

## **General Information on the Kentucky Board of Medical Licensure**

<b>Membership:</b>	Seven Doctors of Medicine One Doctor of Osteopathy Three Citizens at Large Commissioner, Dept. of Public Health, Cabinet for Health & Family Services Dean, University of Kentucky College of Medicine Vice Dean for Clinical Affairs of the University of Louisville School of Medicine Dean, Pikeville College School of Osteopathic Medicine
<b>Terms:</b>	Deans and Commissioner serve while in those positions. Other members serve four-year terms, which rotate.
<b>Panels:</b>	<p>The Board is divided into two Panels of seven. Each Panel acts as an Inquiry Panel for new cases and as a Hearing Panel for complaints filed by the other Panel. The Board's President serves as an ex-officio member of each Panel. KRS 311.591(l)</p> <p><b>Note:</b> A complaint filed by one Panel must be resolved by the other Panel.</p> <p>The Board acts as a body to address new licensing applications and to address policy matters.</p>
<b>Meetings:</b>	<p>Typically scheduled the third or fourth Thursday of the month. The Board meets March, June, September and December.</p> <p>Panel A meets February, May, August and November. Panel B meets January, April, July and October.</p>
<b>Filing Deadline:</b>	To be considered, a pleading must be filed on or before the first day of the month in which the meeting occurs.
<b>Location:</b>	310 Whittington Parkway, Suite IB Louisville, Kentucky 40222 Telephone: (502) 429-8046 Fax: (502) 429-9923 e-mail: <a href="mailto:kbml@ky.gov">kbml@ky.gov</a>
<b>Contact Persons:</b>	C. William Schmidt, Executive Director Michael S. Rodman, Asst. Executive Director C. Lloyd Vest, II, General Counsel L. Chad Elder, Asst. General Counsel Brenda R. Knopp, Office/Systems Manager Lana C. Durbin, Licensure Coordinator

## Disciplinary Function

### I. Types of Cases Prosecuted

The Board's statutory authority for sanctioning a physician's license is KRS 311.595. That statute has 21 subsections, and one of those subsections is further defined in KRS 311.597.

The various violations, by statute section, are:

- False statement(s) on license application 311.595(1)
- Deception in connection with licensing examination 311.595(2)
- Committed or procured an unlawful abortion 311.595(3)
- Felony conviction or conviction for misdemeanor involving deceit 311.595(4)
- Sexual contact with a patient or certain sexual misdemeanor convictions 311.595(5)
- Addicted to a controlled substance 311.595(6)
- Chronic or persistent alcoholic 311.595(7)
- Developed a physical or mental disability so that continued practice is a danger to patients or the public 311.595(8)
- Making false statement(s) in documents connected to medical practice 311.595(10)
- Employed someone as a practitioner who is not licensed 311.595(11)
- Violated any medical practice act provision, including 311.601 311.595(12)
- Violated agreed order, letter of agreement, suspension order or terms of probation 311.595(13)
- Engaged in practice of medicine under false name 311.595(14)
- Obtained thing of value on fraudulent representation that a manifestly incurable condition could be cured 311.595(15)
- Willfully violated a confidential communication 311.595(16)
- Had medical license disciplined by another state 311.595(17)
- Reneged on rural medical scholarship fund agreement 311.595(18)
- Given or received kickback for referral 311.595(19)
- Been removed, suspended or disciplined by professional medical society for unprofessional conduct, incompetence, malpractice or violation of KRS Chapter 311 311.595(20)
- Been disciplined by a licensed hospital or medical staff 311.595(21)
- Improper prescribing 311.597(1); 311.595(9)
- Publishes representations making grossly improbable statements which have a tendency to deceive or defraud a member of the public 311.597(2); 311.595(9)
- Engages in a serious act or pattern of acts which, under circumstances, would be deemed to be gross incompetence, gross ignorance, gross negligence or malpractice 311.597(3); 311.595(9)
- Conduct that fails to conform to the standards of acceptable and prevailing medical practice or fails to conform to the principles of ethics of the AMA or AOA. 311.597(4); 311.595(9)
- Failure by licensee to report violation of Medical Practice Act 311.597(5); 311.595(9)
- Engaged in dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud, or harm the public or any member thereof 311.595(9)

## II. The Grievance Process

**Who may file?** Anyone, including board members. KRS 311.591(2).

**Scope of inquiry** Each grievance shall be investigated *as necessary*. The executive director and the inquiry panels shall have the power to issue investigatory subpoenas for the appearance of any person or production of any record, document, or other item within the jurisdiction of the Commonwealth. KRS 311.591(2)

Agents of the Board have the power and authority to administer oath, to enter upon premises at all times for the purpose of making inspections; to seize evidence, including psychiatric and nonpsychiatric records; to interrogate all persons, and to require the production of books, papers, documents, or other evidence. KRS 311.605(2)

The Inquiry Panel may order a physician to undergo a physical or mental examination by persons designated by the panel, when it has probable cause to believe a physician is suffering from a physical or mental condition that might impede the physician's ability to practice competently. KRS 311.599(1)

**Note:** The doctor's failure to undergo the ordered evaluation, unless it was based upon circumstances beyond their control, constitutes a default admission that the physician has developed such a condition and that continued practice is dangerous to patients or the public. A final order may be entered without taking testimony or other proof. KRS 311.599(2).

The Inquiry Panel is empowered to request the physician's attendance at any meeting of the Panel in regard to its investigation of the grievance. Failure to attend as requested, without good cause, shall be considered unprofessional conduct. 201 KAR section 2, paragraph (2). That would serve as an independent basis for discipline under KRS 311.595(9).

**Physician Input** At some point in their investigation, usually toward the end, the investigators provide the doctor with some or all of the details of their investigation and ask to conduct an interview or to obtain a written response.

Obviously, the doctor is not required to respond. However, if the doctor chooses to make no response, the only thing the Panel will consider will be the grievance and investigative report.

You may want to consider having the physician-client provide a written response so that the Panel may consider their comments in a format controlled by the physician. Depending upon the facts, you may also want to consider proposing an informal resolution of the grievance. Such an approach will give you some input into the decision process and may save your client the costs of additional proceedings.

**Panel's Options** Upon completion of its inquiry, the Panel shall make a finding that:

a) the grievance is without merit and no further action is necessary;

b) the grievance discloses an instance of misconduct which does not warrant the issuance of a complaint; in such instances, the Panel may admonish the physician for the misconduct; or,

c) the grievance discloses one or more violations which warrant the issuance of a complaint; in such cases, the Panel shall cause a complaint to be issued. KRS 311.591(3)

### **III. Forms and Methods of Resolution**

#### **A. The Pleadings**

**Complaint** The Complaint shall contain sufficient information to apprise the physician of the general nature of the charges. KRS 311.591(3)(c)

Service by personal delivery or by certified mail to the physician's last address on record at the Board. KRS 311.591(4)

**Answer** The physician must submit a response within 30 days of service. KRS 311.591(4)

**Prehearing Conferences** The Hearing Officer may conduct prehearing conferences, upon reasonable notice, to address all matters that will promote the orderly and prompt conduct of hearing. May address: jurisdictional matters [does not have authority to enter a final order. 13B.030(1)]

- settlement possibilities
- preparation of stipulations
- clarification of issues rulings on witnesses, taking of evidence, issuance of subpoenas and orders KRS 13B.070(1)

On conclusion of prehearing conferences, hearing officer shall issue a prehearing order incorporating all issues resolved during the hearing. KRS 13B. 070(2)

**Default Rulings** The Hearing Officer may grant a default ruling granting or denying relief if a party:

- fails to respond to the Complaint within 30 days of service. KRS 311.591(4);
- fails to attend any scheduled proceeding; or
- fails to comply with the Hearing Officer's orders. KRS 13B.080(6)

**Discovery** The hearing officer may issue discovery orders when requested by a party or on his own volition. KRS 13B.080(3)

**Notice of Hearing:** At least 20 days prior to the hearing, the Board shall give notice of the hearing with all relevant information specified by KRS 13B.050(3)

**Witness List:** Each party has the right to inspect a list of witnesses the other party intends to call at the hearing, at least five days prior to the hearing. KRS 13B.090(3)

**Exhibits:** Each party has the right to inspect the available evidentiary or tangible evidence, at least five days prior to the hearing. KRS 13B.090(3)

**Copies:** A party may obtain copies of documentary evidence upon the payment of a fee, except documents protected from disclosure by state or federal law. KRS 13B.090(3)

**Work Product Exception:** Nothing in statute shall be construed to give a party the right to examine personal notes, observations or conclusions of agency staff, unless exculpatory in nature, nor shall statute allow access to work product of agency's counsel. KRS 13B.090(7)

**Subpoenas** The hearing officer may issue subpoenas when requested by a party or on his own volition. KRS 13B.080(3)

## **B. The Administrative Hearing**

**Location** Hearings are conducted at the Board's offices.

**Standard of Proof** By a preponderance of the evidence. KRS 13B.090(7)

**Burden of Proof** The Board has the burden of persuasion to show the propriety of a penalty imposed. KRS 13B.090(7)

**Evidence** All testimony shall be made under oath or affirmation. However, any part of the evidence may be received in written form if doing so will expedite the hearing without substantial prejudice to either party. KRS 13B.090(2)

Findings must be based upon evidence on the record. Hearing officer may exclude evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the grounds of evidentiary privilege recognized by courts. KRS 13B.090(1)

Hearsay evidence may be admissible, if it is the type of evidence that reasonable and prudent persons would rely on in their daily affairs, but shall not be sufficient in itself to support an agency's finding of fact unless it would survive an objection in a civil action. KRS 13B.090(1) Hearing officer shall regulate course of hearing to promote the orderly and prompt conduct of the hearing. KRS 13B.080(1)

The hearing officer shall afford the parties the opportunity to present evidence and argument, conduct cross-examination, and submit rebuttal evidence. KRS 13B.080(4)

The hearing officer may conduct all or part of hearing or prehearing conference by telephone, by television, or other electronic means, if each party has an opportunity to hear, and if feasible, to see the entire proceeding as it occurs, and if each party agrees. KRS 13B.080(7)

Hearings shall be open unless specifically closed pursuant to a provision of law. KRS 13B.080(8)

### **C. The Hearing Officer's Recommended Order**

<b>Input by Parties</b>	At appropriate stages of the proceedings, the hearing officer may give the parties full opportunity to file briefs, proposed findings of fact and conclusions of law, and proposed recommended or final orders. KRS 13B.080(2)
<b>Timing</b>	Hearing officer has 60 days from receipt of official record to file report, unless extension is granted by agency. Agency head may grant extension of up to 30 days, upon showing of good cause. KRS 13B.110
<b>Recommended Order</b>	<p>The hearing officer shall provide agency a written recommended order which shall include findings of fact, conclusions of law, and recommended disposition of the hearing, including recommended penalties, if any. KRS 13B.110(1)</p> <p>The recommended order shall also include statement of party's exception and appeal rights.</p>
<b>Exceptions</b>	A copy of the recommended order shall be sent to each party. Each party shall have 15 days <i>from the date the recommended order was mailed</i> in which to file exceptions with the agency head. KRS 13B.110(4) Transmittal of recommended order is by regular mail.

### **D. The Board's Final Order**

<b>Board's Options</b>	<p>The Hearing Panel shall issue an order that:</p> <ol style="list-style-type: none"><li>dismisses the complaint upon a conclusion there has been no violation;</li><li>finds a violation, but does not impose discipline because the panel does not believe discipline to be necessary under the circumstances;</li><li>imposes discipline upon the licensee</li></ol>
<b>Action on Recommended Order</b>	<p>The Hearing Panel may:</p> <ul style="list-style-type: none"><li>accept the recommended order and adopt it as the final order;</li><li>reject or modify, in whole or part, the recommended order, or,</li><li>remand the matter, in whole or in part, to the hearing officer for further proceedings as appropriate. KRS 13B.120(2)</li></ul>
<b>Variance</b>	If the final order differs from the recommended order, it shall include separate statements of findings of fact and conclusions of law. KRS 13B.120(3)
<b>Form</b>	The final order shall be in writing and shall be stated in the record. It shall also include the effective date of the order and advise the parties fully of available appeal rights. KRS 13B.120(3)
<b>Timing</b>	The final order shall be rendered within 90 days after the hearing officer submits a recommended order, unless the Hearing Panel remands the matter to the hearing officer. KRS 13B.120(4)

## **E. Penalties**

### **Penalties Available Under Statute**

KRS Chapter 311 provides for the following penalties upon proof of a violation of KRS 311.595:

- a) revocation of the license; or,
- b) suspension of the license for not more than five years; or,
- c) placing the license on probation for not more than five years; or,
- d) a combination of suspension and probation for not more than five years; or,
- e) limitation or restriction of the license for an indefinite period; or,
- f) reprimand the license;
- g) deny application or re-registration of a license; and/or
- h) impose fines of not greater than \$5000 per violation. KRS 311.565(1)(c) and (1)(u); 311.591(8)(c), 311.595.

### **Sexual Offenses**

If the Board substantiates that sexual contact occurred between the doctor and a patient during their professional relationship, the doctor's license may be revoked or suspended with mandatory treatment of the doctor as prescribed by the Board. The Board may also require the doctor to pay a specified amount for mental health services for the patient needed as a result of the sexual contact. KRS 311.591(8)(c)

## **F. Judicial Review of Board's Final Order**

### **Timing**

A party shall institute an appeal by filing a petition for judicial review within 30 days after the final order is mailed or delivered by personal service. KRS 13B.140(1)

### **Venue**

Jefferson Circuit Court. KRS 13B.140(1); 311.593(2)

### **Petition**

Must include names and addresses of all parties to the proceedings and the agency involved, and a statement of the grounds on which the review is requested. The petition must also include a copy of the final order as an attachment. KRS 13B.140(1)

### **Record**

The agency shall transmit the original or a certified copy of the official record, within 20 days after service of the petition or such other time allowed by the court. The parties may agree to shorten the record. KRS 13B.140(3)

### **Exhaustion**

A party may only file a petition for judicial review after the party has exhausted all administrative remedies, available within the agency. KRS 13B.140(2)

### **Standard of Review**

The court may only modify or remand those actions where the action of the Board:

- 1) constitutes a clear abuse of discretion;
- 2) is clearly beyond its legislative delegated authority; or
- 3) violated the procedure for disciplinary action as described in KRS 311.591. KRS 311.555

The findings of the agency shall be affirmed if they are supported by "substantial evidence." Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298 (1972)

The Circuit Court is not permitted to substitute its judgment for that of the agency. Fuller.

#### **G. Informal Proceedings**

<b>Authority</b>	The Board may establish regulations regarding the informal disposition of any complaint and such disposition may be made at any stage of the proceeding. KRS 311.591(6); 13B.070.
<b>Waiver</b>	The physician must sign a waiver that states that the physician waives the right to raise any constitutional, statutory or common law objection should the Board reject the informal proposal or if informal proceedings are curtailed by the general counsel. 201 KAR 9:082(1)
<b>Requirements</b>	<p>Whenever the general counsel believes that an appropriate informal resolution has been negotiated, the general counsel shall present to the Hearing Panel the physician's signed waiver and an informal resolution which contains:</p> <ul style="list-style-type: none"><li>• stipulations of fact;</li><li>• conclusions of law;</li><li>• a proposed order of informal dispensation</li><li>• the signatures of the general counsel and the licensee, with a line for the signature of a Board officer.</li></ul> <p>Such informal resolution becomes effective upon being accepted by the Board, signed by an officer and filed of record. 201 KAR 9:082(2)</p>
<b>Rejection</b>	If an informal resolution is rejected, the administrative proceedings continue; the parties may continue to negotiate in an attempt to reach a resolution acceptable to the Board. Rejection shall not be taken as a finding or determination and no orders or other pleadings shall be filed of record in regard to the rejected proposal. 201 KAR 9:082(3)

#### **IV. The Impaired Physicians Program**

<b>The Committee</b>	The Board may establish an impaired physicians committee, to be designated as the Kentucky Committee on Impaired Physicians, to promote the early identification, intervention, treatment, and rehabilitation of physicians who may be impaired by reason of illness, alcohol or drug abuse, or as a result of any physical or mental condition.
<b>Location</b>	9000 Wessex Place, Suite 305 Louisville, Kentucky 40222
<b>Telephone</b>	(502) 425-7761
<b>Contact Person</b>	Burns M. Brady, M.D., Medical Director
<b>Confidentiality</b>	All information, interviews, reports, memoranda or other documents furnished to or produced by the Committee which pertain to or refer to a physician who may be or who is actually impaired shall be privileged and confidential. KRS 311.619(1)

All records and proceedings of the committee which pertain or refer to a physician who may be or who is actually impaired shall be privileged and confidential. KRS 311.619(2)

**Exceptions:** The committee may release such information:

- a) when disclosure is essential to further the intervention, treatment, or rehabilitation needs of the physician, and then only to those persons or organizations with a need to know;
- b) when its release is authorized in writing by the impaired physician; or
- c) when the committee is required to make a report to the Board.

## **V. Emergency Orders**

<b>Authority</b>	An inquiry panel may issue an order suspending, limiting, or restricting a physician's license when the panel has probable cause to believe: <ul style="list-style-type: none"><li>• the physician has violated the terms of an order of probation; or,</li><li>• the physician's practice constitutes a danger to the health, welfare and safety of his patients or the general public. KRS 311.592; 13B. 125</li></ul>
<b>Requirements</b>	The emergency order shall contain findings of fact and conclusions of law supporting the order. The order shall be served by certified mail, return receipt requested, and sent to the last address known to the Board. The Order shall become effective upon receipt by the licensee or representative. KRS 13B. 125(2).
<b>Hearing</b>	The licensee may request an emergency hearing and the Board must conduct the hearing within 10 working days of the request. The Board shall give all parties reasonable notice and to the extent practicable shall conduct the hearing in conformity with Chapter 13B.
<b>Standard of Review</b>	The emergency order shall be affirmed if there is substantial evidence of a violation of the law which constitutes an immediate danger to the public health, safety or welfare. KRS 13B. 125(3)
<b>Appeal</b>	The decision of the hearing officer shall be a final order and either party may appeal to the circuit court as otherwise provided. KRS 13B.125(4)
<b>Strategy</b>	The primary concern for your client will be to get back to work. While you may pursue all legal remedies, you should also candidly assess the facts available and consider whether there are informal agreements that your client is willing to accept in order to go back to practice, pending resolution of the complaint.

## **VII. Discovery Through Open Records Request**

When a complaint or emergency order are entered and a licensee comes to you for assistance in preparing a response or in preparing for an emergency hearing, you will likely want access to the supporting documents more quickly than you would receive them through normal discovery.

After receiving the complaint or emergency order, you could obtain the Panel memo and the investigative report pursuant to an Open Records request, under KRS 61.870 et seq. The statute provides

for inspection within 3 working days of the request. Obviously, we would not want to duplicate that production as part of discovery later.